

105TH CONGRESS  
2D SESSION

# S. 1613

To reform the regulatory process, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 5, 1998

Mr. FEINGOLD introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To reform the regulatory process, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 **SECTION 1. EQUAL ACCESS TO JUSTICE REFORM.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Equal Access to Justice Reform Amendments of 1998”.

6 (b) AWARD OF COSTS AND FEES.—

7 (1) ADMINISTRATIVE PROCEEDINGS.—Section  
8 504(a)(2) of title 5, United States Code, is amended  
9 by inserting after “(2)” the following: “At any time  
10 after the commencement of an adversary adjudica-  
11 tion covered by this section, the adjudicative officer  
12 may ask a party to declare whether such party in-

tends to seek an award of fees and expenses against the agency should such party prevail.”.

(2) JUDICIAL PROCEEDINGS.—Section 2412(d)(1)(B) of title 28, United States Code, is amended by inserting after “(B)” the following: “At any time after the commencement of an adversary adjudication covered by this section, the court may ask a party to declare whether such party intends to seek an award of fees and expenses against the agency should such party prevail.”.

(c) HOURLY RATE FOR ATTORNEY FEES.—

(1) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(A)(ii) of title 5, United States Code, is amended by striking all beginning with “\$125 per hour” and inserting “\$125 per hour unless the agency determines by regulation that an increase in the cost-of-living based on the date of final disposition justifies a higher fee);”.

(2) JUDICIAL PROCEEDINGS.—Section 2412(d)(2)(A)(ii) of title 28, United States Code, is amended by striking all beginning with “\$125 per hour” and inserting “\$125 per hour unless the court determines that an increase in the cost-of-living based on the date of final disposition justifies a higher fee);”.

1 (d) PAYMENT FROM AGENCY APPROPRIATIONS.—

2 (1) ADMINISTRATIVE PROCEEDINGS.—Section  
 3 504(d) of title 5, United States Code, is amended by  
 4 adding at the end the following: “Fees and expenses  
 5 awarded under this subsection may not be paid from  
 6 the claims and judgments account of the Treasury  
 7 from funds appropriated pursuant to section 1304 of  
 8 title 31.”.

9 (2) JUDICIAL PROCEEDINGS.—Section  
 10 2412(d)(4) of title 28, United States Code, is  
 11 amended by adding at the end the following: “Fees  
 12 and expenses awarded under this subsection may not  
 13 be paid from the claims and judgments account of  
 14 the Treasury from funds appropriated pursuant to  
 15 section 1304 of title 31.”.

16 (e) OFFERS OF SETTLEMENT.—

17 (1) ADMINISTRATIVE PROCEEDINGS.—Section  
 18 504 of title 5, United States Code, is amended—

19 (A) by redesignating subsections (e) and  
 20 (f) as subsections (f) and (g), respectively; and

21 (B) by inserting after subsection (d) the  
 22 following new subsection:

23 “(e)(1) At any time after the filing of an application  
 24 for fees and other expenses under this section, an agency  
 25 from which a fee award is sought may serve upon the ap-

1 plicant an offer of settlement of the claims made in the  
 2 application. If within 10 days after service of the offer the  
 3 applicant serves written notice that the offer is accepted,  
 4 either party may then file the offer and notice of accept-  
 5 ance together with proof of service thereof.

6 “(2) An offer not accepted shall be deemed with-  
 7 drawn. The fact that an offer is made but not accepted  
 8 shall not preclude a subsequent offer. If any award of fees  
 9 and expenses for the merits of the proceeding finally ob-  
 10 tained by the applicant is not more favorable than the  
 11 offer, the applicant shall not be entitled to receive an  
 12 award for attorneys’ fees or other expenses incurred in re-  
 13 lation to the application for fees and expenses after the  
 14 date of the offer.”.

15 (2) JUDICIAL PROCEEDINGS.—Section 2412 of  
 16 title 28, United States Code, is amended—

17 (A) by redesignating subsections (e) and  
 18 (f) as subsections (f) and (g), respectively; and

19 (B) by inserting after subsection (d) the  
 20 following new subsection:

21 “(e)(1) At any time after the filing of an application  
 22 for fees and other expenses under this section, an agency  
 23 of the United States from which a fee award is sought  
 24 may serve upon the applicant an offer of settlement of the  
 25 claims made in the application. If within 10 days after

1 service of the offer the applicant serves written notice that  
 2 the offer is accepted, either party may then file the offer  
 3 and notice of acceptance together with proof of service  
 4 thereof.

5 “(2) An offer not accepted shall be deemed with-  
 6 drawn. The fact that an offer is made but not accepted  
 7 shall not preclude a subsequent offer. If any award of fees  
 8 and expenses for the merits of the proceeding finally ob-  
 9 tained by the applicant is not more favorable than the  
 10 offer, the applicant shall not be entitled to receive an  
 11 award for attorneys’ fees or other expenses incurred in re-  
 12 lation to the application for fees and expenses after the  
 13 date of the offer.”.

14 (f) ELIMINATION OF SUBSTANTIAL JUSTIFICATION  
 15 STANDARD.—

16 (1) ADMINISTRATIVE PROCEEDINGS.—Section  
 17 504 of title 5, United States Code, is amended—

18 (A) in subsection (a)(1), by striking all be-  
 19 ginning with “, unless the adjudicative officer”  
 20 through “expenses are sought”; and

21 (B) in subsection (a)(2), by striking “The  
 22 party shall also allege that the position of the  
 23 agency was not substantially justified.”.

24 (2) JUDICIAL PROCEEDINGS.—Section 2412(d)  
 25 of title 28, United States Code, is amended—

1 (A) in paragraph (1)(A), by striking “, un-  
 2 less the court finds that the position of the  
 3 United States was substantially justified or that  
 4 special circumstances make an award unjust”;

5 (B) in paragraph (1)(B), by striking “The  
 6 party shall also allege that the position of the  
 7 United States was not substantially justified.  
 8 Whether or not the position of the United  
 9 States was substantially justified shall be deter-  
 10 mined on the basis of the record (including the  
 11 record with respect to the action or failure to  
 12 act by the agency upon which the civil action is  
 13 based) which is made in the civil action for  
 14 which fees and other expenses are sought.”; and

15 (C) in paragraph (3), by striking “, unless  
 16 the court finds that during such adversary ad-  
 17 judication the position of the United States was  
 18 substantially justified, or that special cir-  
 19 cumstances make an award unjust”.

20 (g) REPORTS TO CONGRESS.—

21 (1) ADMINISTRATIVE PROCEEDINGS.—No later  
 22 than 180 days after the date of the enactment of  
 23 this Act, the Administrative Conference of the  
 24 United States shall submit a report to Congress—

1 (A) providing an analysis of the variations  
2 in the frequency of fee awards paid by specific  
3 Federal agencies under the provisions of section  
4 504 of title 5, United States Code; and

5 (B) including recommendations for extend-  
6 ing the application of such sections to other  
7 Federal agencies and administrative proceed-  
8 ings.

9 (2) JUDICIAL PROCEEDINGS.—No later than  
10 180 days after the date of the enactment of this Act,  
11 the Department of Justice shall submit a report to  
12 Congress—

13 (A) providing an analysis of the variations  
14 in the frequency of fee awards paid by specific  
15 Federal districts under the provisions of section  
16 2412 of title 28, United States Code; and

17 (B) including recommendations for extend-  
18 ing the application of such sections to other  
19 Federal judicial proceedings.

20 (h) EFFECTIVE DATE.—The provisions of this Act  
21 and the amendments made by this Act shall take effect  
22 30 days after the date of the enactment of this Act and  
23 shall apply only to an administrative complaint filed with

- 1 a Federal agency or a civil action filed in a United States
- 2 court on or after such date.

